Supreme Court, U.S.
FILED
NOV 30 1999
CLERK

No. 99-399

IN THE
SUPREME COURT OF THE UNITED STATES

STATE OF ARIZONA
Petitioner,

vs.

BILLY JOE FLANNIGAN,
Respondent.

PETITION FOR WRIT OF CERTIORARI

TO THE

ARIZONA SUPREME COURT

RESPONDENT'S BRIEF IN OPPOSITION

CHRISTOPHER V. JOHNS
Deputy Public Defender
11 West Jefferson, Suite 5
Phoenix, Arizona 85003-2302
Attorney for *RESPONDENT*

QUESTION PRESENTED

When the evidence shows that it is practical to obtain a warrant because the exigent circumstance is drugs that are less evanescent than alcohol, do law enforcement officials violate the Fourth Amendment by not obtaining a warrant, by instead relying upon a fixed policy that all traffic accident cases involving a serious injury or death automatically equal "exigent circumstances?"

TABLE OF CONTENTS

Page

QUESTION PRESENTED.....i

TABLE OF AUTHORITIES iii

RESPONSE TO PETITION FOR WRIT OF CERTIORARI.....1

REASONS FOR DENYING THE PETITION.....1

I. The issue presented is moot. Before petitioning for a writ for certiorari the State negotiated a plea agreement with Flannigan for time served. Flannigan has been sentenced, jeopardy has attached, and his time to appeal has lapsed.....1

II. No compelling grounds exist to grant a writ of certiorari since the Arizona Court of Appeals decision is consistent with federal law and holds only that the State may not rely on a traffic accident to automatically bestow exigent circumstances in order to seize evidence from an arrestee.....4

CONCLUSION.....9

TABLE OF AUTHORITIES

PAGE

CASES

Campas v. Superior Court In and For County of Maricopa, 159 Ariz. 343,767 P.2d 230 (1989).....3
Ex parte Lange, 85 U.S. (1l Wall. 163)(1873).....2
Johnson v. United States, 333 U.S. 10 (1960) 8
Menna v. New York, 423 U.S. 61 (1975) 2
Mincey v. Arizona, 437 U.S. 385 (1978).....5,7,8
Minnesota v. Olson, 495 U.S. 91 (1990).....5
North Carolina v. Pearce, 395 U.S. 711 (1969) 3
Schmerber v. California, 384 U.S. 757 (1966) 4,5
Skinner v. Railway Labor Executives Assn., 489 U.S. 602 (1989).....7
State v. Cocio, 147 Ariz. 277, 709 P.2d 1336 (1985) 7
State v. Krantz, 174 Ariz. 211, 848 P.2d 296 (App. 1992) 7
Wisconsin v. Bohling, 494 N.W.2d 399 (1993).....6,7

CONSTITUTIONAL PROVISIONS

Arizona Const. Art. 2 § 10 3
U.S. Const. Amend. IV 4,8
U.S. Const. Amend. V.....3

RULES

Rule 10, Supreme Court Rule 4
Rule 17, Ariz. Rules of Crim. P. 3
Rule 31.23(b), Ariz. Rules of Crim. P. 3

OTHER AUTHORITIES

LaFave, *Search and Seizure*, section 6.5(1)(1994) 5

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

Billy Joe Flannigan ("Flannigan") respectfully requests that the Court deny the petition by the State of Arizona ("State") for a writ of certiorari.

JURISDICTION

This Court lacks jurisdiction. Before applying for a writ of certiorari, the State entered into a plea agreement with Flannigan. The Superior Court of Arizona for Maricopa County accepted the plea agreement and sentenced Flannigan on July 20, 1999. Flannigan's time to file an appeal from his plea agreement has lapsed. Jeopardy has attached.

REASONS FOR DENYING THE PETITION

I. The issue presented is moot. Before petitioning for a writ of certiorari the State negotiated a plea agreement with Flannigan for time served. Flannigan has been sentenced, jeopardy has attached, and his time to appeal has lapsed.

The Arizona Court of Appeals issued its decision in this case on November 3, 1998. *See* Arizona Court of Appeals Order and Mandate, Appendix A (filed June 18, 1999). The State timely filed a motion for rehearing, followed by a petition

for review with the Arizona Supreme Court. The Arizona Supreme Court denied the petition for review on May 26, 1999. *Id.*

On July 20, 1999, the State entered into a written plea agreement with Flannigan. *See* Appendix B. The agreement sentenced Flannigan to time served, a final restitution payment, and revocation of his driving privileges. The Maricopa County Superior Court accepted the plea agreement and sentenced Flannigan the same day. *See* Sentence of Imprisonment, Appendix C.

The trial court advised Flannigan of his right to an appeal and to file a petition for post conviction relief. *Id.* Flannigan's jurisdiction time limits have lapsed to file either form of relief. *Id.*

It is "settled" that "no man can twice lawfully be punished for the same offense after conviction." *Ex parte Lange*, 85 U.S. (18 Wall. 163)(1873). This case is moot because jeopardy has attached. The State of Arizona voluntarily entered into a plea agreement with Flannigan more than 30 days before filing a writ of certiorari. Nothing in the plea agreement provided for waiver of jeopardy. Any waiver of the prohibition against double jeopardy must be express. *See Menna v. New York*, 423 U.S. 61 (1975).

The primary purpose of the double jeopardy clause is to protect persons "against a second prosecution for the same offense after conviction. *See North Carolina v. Pearce,* 395 U.S. 711, 717 (1969). Acceptance of a guilty plea places the accused in jeopardy. U.S. Const. Amend. V; Ariz. Const. Art. 2, section 10; *see also Campas v. Superior Court In and For County of Maricopa,* 159 Ariz. 343, 767 P.2d 230 (1989).

Applying these principles, the State cannot enter into a plea agreement with Flannigan finalizing his case and then attempt to overturn his conviction through a petition of certiorari. The State has in effect waived its right to file a writ of certiorari, It is without authority to prosecute Flannigan. Likewise, the State has no authority to request this Court to provide an advisory opinion. Moreover, if the State intended to seek a writ of certiorari, it could have sought a stay of the issuance of the Court of Appeal's mandate and order. Rule 17, of the Arizona Rules of Criminal Procedure, provides such a procedural mechanism. *See* Appendix D, Rule 31.23(b) Ariz. Rules of Crim. P. The State chose not to seek a stay. Once a mandate is issued the appellate process is terminated. The State should not be allowed to resurrect a case it bargained away. Any attempt to do so would profoundly impact Flannigan's constitutional rights.

The case is moot.

II. **No compelling grounds exist to grant a writ of certiorari since the Arizona Court of Appeals decision is consistent with federal law, and holds only that the State may not rely on a traffic accident to automatically bestow exigent circumstances to seize evidence from an arrestee.**

Even if this Court were to ignore mootness in order to issue a writ of certiorari there is no compelling reason to grant the State's petition. Supreme Court Rule 10 sets forth the limited circumstances in which this Court will exercise its discretionary powers in granting a petition for writ of certiorari. A close reading of the Arizona Court of Appeals opinion shows that this case does not meet any of the prerequisites of Rule 10.

The Arizona Court of Appeals Decision Does not Conflict with Schmerber.

For more than three decades *Schmerber v. California*, 384 U.S. 757 (1966) has established that seizing blood as evidence of guilt constitutes a search triggering Fourth Amendment constitutional protection. U.S. Const. Amend. IV. A warrantless blood seizure may, however, be constitutional if it falls within an exception to the warrant requirement. Despite an intrusion into the body, blood may be seized if there are exigent circumstances. The exception is based on the

rationale that substances in the blood will disappear and, consequently, evidence will be destroyed.

Constitutionally, a warrantless search must be strictly circumscribed by the emergency that justified its initiation. *Minnesota v. Olson,* 495 U.S. 91, 101 (1990); *see also Mincey v. Arizona,* 437 U.S. 385 (1978)(rejecting a murder scene exception to the warrant requirement). Not every circumstance that threatens destruction of potential evidence justifies its seizure. Wayne R. LaFave, *Search and Seizure,* section 6.5(a)(1994).

Applying *Schmerber* to the facts of Flannigan's case, the Arizona Court of Appeals held that exigent circumstances did not exist. It based its holding on the fact that the State did not consider obtaining a warrant. Instead, the State relied upon the mechanical test that whenever there is a car accident exigent circumstances automatically exist.

In Flannigan's case, evidence at the suppression hearing showed that police routinely obtain telephonic warrants in from 15 to 45 minutes. Unlike *Schmerber,* Flannigan's case did not involve alcohol, but instead probable cause to believe that a stimulant class of drug was present in his body. Evidence further showed that stimulants, whether methamphetamine or

cocaine, remain considerably longer in the body than alcohol. In some cases, stimulants may remain in the body up to 4 days.

The State wants to make this an alcohol case. Virtually every case it relies upon for authority involves alcohol. The entire rationale of the State's case is based on a substance that is eliminated by the body at a substantially faster rate than stimulants. Moreover, alcohol prosecutions rely upon an accurate measurement of blood alcohol level, while in Flannigan's case the issue is only detection.

Wisconsin v. Bohling is Distinguishable.

The State's reliance on *Wisconsin v. Bohling* is inapplicable to Flannigan's case. It involved alcohol. *Bohling*, read in the proper context, does not support the State's argument. Further, compare, Note, 60 So. Cal. L. rev. 1115, 1140 (1987) to *Bohling*. The Note argues that "since alcohol dissipates over a fairly long period of time . . . expedited procedures for obtaining search warrants and procedures presently used in felony drunk driving cases, in at least some states, negate the argument that the evidence will not survive the period required to obtain the warrant." Both *Bohling* and the above Note are extensively discussed in LaFave, *Search and Seizure*, section 6.5(a)(1994).

Skinner v. Railway Labor Executives Assn.

Likewise, the State's reliance on *Skinner v. Railway Labor Executives Assn.*, 489 U.S. 602, is misplaced. *Skinner* involves a different exception to the warrant requirement based on a public employee administrative search.

Flannigan does not conflict with other Arizona cases.

As untenable as the State's argument that *Bohling* and *Skinner* support its reading of Flannigan's case is its contention that it overrules Arizona cases. It does not.

State v. Cocio, 147 Ariz. 277, 709 P.2d 1336 (1985) turned on blood taken for medical purposes. *State v. Krantz*, 174 Ariz. 211, 848 P.2d 296 (App. 1992), turned on obtaining evidence in a DUI context. The State cannot cite an Arizona case that, read closely, is inconsistent with the decision in *Flannigan.*

An Accident Exception to the Warrant Requirement.

What the State really seeks is an accident exception to the warrant requirement not unlike the "murder scene" exception this Court overruled in *State v. Mincey.* That is what this case is all about.

The fairly complicated facts of *Mincey* can be briefly summarized as follows: During a narcotics raid on Mincey's apartment in Tucson, Arizona, an undercover police officer,

who had slipped into Mincey's bedroom, was found shot and later died. Homicide detectives conducted an exhaustive warrantless search of Mincey's apartment for four days and seized over 200 objects. Mincey was convicted of murder, assault, and several narcotic violations. During the trial and appeal, Mincey argued that the evidence seized from his apartment should be suppressed. The Arizona Supreme Court, however, held that a warrantless search of a homicide scene did not violate the Fourth Amendment so long as the search was reasonably limited to determine the circumstances of death. In others words, a "murder scene" exception to the Fourth Amendment. This Court did not agree. As justice Stewart wrote in *Mincey:*

> The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often-competitive enterprise of ferreting out crime. (*Citing Johnson v. United States,* 333 U.S. 10, 13-14 (1960)).

It is the nature of the threat to the destruction of evidence that defines the exigent circumstance exception in all

cases. In this case, given that the evidence could have been detected for up to approximately 4 days, it was reasonable for law enforcement officials to obtain a warrant. The State had ample time to obtain a warrant before the destruction of evidence.

CONCLUSION

The petition for writ of certiorari should be denied. The State should not be allowed to breathe new life into a case it bargained away. Jeopardy has attached and the case is moot.

Further, the Arizona Court of Appeals left completely in tact the exigent circumstances exception carved out from the Fourth Amendment that permits police officers to conduct a search if there is probable cause to believe evidence will be destroyed. The destruction of evidence must be imminent. It was not in this case.

Respectfully submitted,

CHRISTOPHER V. JOHNS
Deputy Public Defender
(Counsel of Record)
11 West Jefferson, Suite 5
Phoenix, Arizona 85003
(602) 506-8190
Counsel for RESPONDENT

APPENDIX A

IN THE
COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, Appellee, v. **BILLY JOE FLANNIGAN,** Appellant.	No. 1 CA-CR 97-0763 DEPARTMENT A Maricopa County Superior Court No. CR-95-90117

ORDER and MANDATE

Janet A. Napolitano, The Attorney General
By: Paul J. McMurdie, Chief Counsel,
Criminal Appeals Section
and
Gregory A. McCarthy, Assistant Attorney General
Attorney for Appellee

Dean W. Trebesch, Maricopa County Public Defender
By: Christopher V. Johns, Deputy Public Defender
Attorneys for Appellant

ORDER and MANDATE

1 CA-CR 97-0763

DEPARTMENT A

MARICOPA County
Superior Court
No. CR 95-90117

The opinion of this Court in the above matter was filed on November 3, 1998.

The motion for reconsideration was denied and notice thereof was given on December 4, 1998. A petition for review was filed. The record was forwarded to the Arizona Supreme Court. By order, dated May 26, 1999, the Arizona Supreme Court denied the petition for review, Supreme Court No. CR-98-0551-PR.

IT IS ORDERED in conformity with the opinion attached hereto.

IT IS FURTHER ORDERED that a certified copy of the foregoing ORDER and

MANDATE and a copy of the opinion of the court were mailed to the Clerk of the Superior Court for MARICOPA County, Arizona, on June 18, 1999. A copy of the ORDER and MANDATE and a copy of the opinion were mailed to the Honorable Mark F. Aceto, Judge, and a copy of the ORDER and MANDATE was mailed on said day to each party appearing or the attorneys of record; as well as the MARICOPA County Attorney.

ORDER and MANDATE

Page Three

1 CA-CR 97-0763

DEPARTMENT A

MARICOPA County
Superior Court
No. CR 95-90117

IT IS FURTHER ORDERED pursuant to this Court's order of the 11th day of March, 1965, that the Clerk of this Court return to the Clerk of the Superior Court, all records, exhibits, and other matters received form said Clerk of the Court in aid of the consideration of this matter.

DATED June 18, 1999.

_____
VICE CHIEF JUDGE

All of the foregoing directives were
complied with June 18,1999.

GLEN D. CLARK, Clerk
By

_____

APPENDIX B

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

STATE OF ARIZONA, Plaintiff, v. BILLY JOE FLANNIGAN, Defendant.	No. CR-95-90117 **PLEA AGREEMENT**

The State of Arizona and the Defendant hereby agree to the following disposition of this case:

Plea: The Defendant agrees to plead guilty to:

Count 1: Negligent Homicide, a Class 4 Felony, in violation of A.R.S. §§ 13-1011, 13-1102, 28-444, 28-445, 28-448, 13-701, 13-702, and 13-801 committed on August 18, 1994.

This is a nondangerous, nonrepetitive offense under the criminal code.

THIS OFFER EXPIRES AND IS REVOKED IF NOT ENTERED IN COURT BY July 20,1999.

Terms: On the following understandings, terms and conditions:

☐1. The crime carries a presumptive sentence of 2.5 years; a minimum sentence of 1.5 years (1 years if trial court

STATE OF ARIZONA, Plaintiff, v. BILLY JOE FLANNIGAN, Defendant.	No. CR-95-90117 **PLEA AGREEMENT**

makes exceptional circumstances finding); and a maximum sentence of 3 years (3.75 years if trial court makes exceptional circumstances finding). Probation is available. Restitution of economic loss to the victim and waiver of extradition for probation revocation procedures are required. The maximum fine that can be imposed is $150,000 plus a 57% surcharge. If the Defendant is sentenced to prison, the Defendant shall also be sentenced to serve a term of community supervision equal to one-seventh of the prison term to be served consecutively to the actual period of imprisonment. If the Defendant fails to abide by the conditions of community supervision, the Defendant can be required to serve the remaining term of community supervision in prison. Special conditions regarding the sentence imposed by statute (if any) are mandatory revocation of Defendant's driving privileges by M.V.D.

☐2. The parties stipulate to the following additional terms, subject to court approval at the time of sentencing as set forth in paragraph 7.)
Defendant shall be sentenced to the Department of Corrections for a period of time equal to time served. Restitution shall be paid to the MCSO Business Office

STATE OF ARIZONA, Plaintiff, v. BILLY JOE FLANNIGAN, Defendant.	No. CR-95-90117 **PLEA AGREEMENT**

in the amount of $1,792.26. The Defendant's driving privileges shall be revoked.

☐3. The following charges are dismissed or, if not yet filed, shall not be brought against the Defendant:

Counts 2 and 3.

☐4. This agreement serves to amend the complaint or information, to charge the offense to which the Defendant pleads, without the filing of any additional pleading. However, if the plea is rejected by the court or withdrawn by either party, or if the conviction is subsequently reversed, the original charges and any charges that are dismissed by reason of this plea agreement are automatically reinstated.

☐5. If the Defendant is charges with a felony, he hereby waives and gives up his rights to a preliminary hearing or other probable cause determination on the charges to which he pleads. The Defendant agrees that this agreement shall not be binding on the State should the Defendant be charged with or commit a crime between the time of this agreement and the time for sentencing

STATE OF ARIZONA,

Plaintiff,

v.

BILLY JOE FLANNIGAN,

Defendant.

No. CR-95-90117

PLEA AGREEMENT

in this cause; not shall this agreement be binding on the State until the State confirms all representations made by the Defendant and his attorney, to wit:

None.

If the Defendant fails to appear for sentencing, the court may disregard the stipulated sentence and impose any lawful sentence which is the same as or exceeds the stipulated sentence in the plea agreement. In the event the court rejects the plea, or either the State or the Defendant withdraws the plea, the Defendant hereby waives and gives up his right to a preliminary hearing or other probable cause determination on the original charges.

☐6. Unless this plea is rejected by the court or withdrawn by either party, the Defendant hereby waives and gives up any and all motions, defenses, objections, or requests which he has made or raised, or could assert hereafter, to the court's entry of judgment against him and imposition of a sentence upon him consistent with this agreement. By entering this agreement, the Defendant further waives and gives up the right to appeal.

STATE OF ARIZONA

Plaintiff,

v.

BILLY JOE FLANNIGAN,

Defendant.

No. CR-95-90117

PLEA AGREEMENT

☐7. The parties hereto fully and completely understand and agree that it is the court's duty to impose sentence upon the Defendant, and that any sentence either stipulated to or recommended herein in paragraph two is not binding on the court. If after accepting this plea the court concludes that any of the plea agreement's provisions regarding the sentence or the term and conditions of probation are inappropriate, it can reject the plea. If the court decides to reject the plea agreement provisions regarding sentencing, it must give bother the state and the Defendant an opportunity to withdraw from the plea agreement. In case this plea agreement is withdrawn, all original charges will automatically be reinstated. The Defendant in such case waives and give up his right to a probable cause determination on the original charges.

☐8. If the court decides to reject the plea agreement provisions regarding sentencing and neither the state nor the Defendant elects to withdraw the plea agreement, then any sentence either stipulated to or recommended herein in paragraph 2 is not binding upon the court, and the court is bound only by the sentencing limits set forth in paragraph 1 and the applicable statutes.

STATE OF ARIZONA,

Plaintiff,

v.

BILLY JOE FLANNIGAN,

Defendant.

No. CR-95-90117

PLEA AGREEMENT

☐9. This plea agreement in no way affects any forfeiture proceedings pursuant to A.R.S. § 13-4301 et esq., § 13-2314, or § 32-1993, if applicable, nor does the plea agreement in any way compromise or abrogate any civil actions, including actions pursuant to A.R.S. § 13-2301 et seq. or § 13-4301 et seq., or the provisions of A.R.S. § 13-2314 or A.R.S. § 13-4310.

☐10. I have read and understand the provisions of pages one and two of this agreement I have discussed the case and my constitutional rights with my lawyer. I understand that by pleading guilty I will be waiving and giving up my right to a determination of probable cause, to a trial by jury, to confront, cross-examine, compel the attendance of witnesses, to present evidence in my behalf, my right to remain silent, my privilege against self-incrimination, presumption of innocence and right to appeal. I agree to enter my plea as indicated above on the terms and conditions set forth herein. I fully understand that if, as part of this plea agreement, I am granted probation by the court, the terms and conditions thereof are subject to modification at any time during the period of probation. I understand that if I violate any of the written conditions of my probation, my probation may be terminated and I can be sentenced to

STATE OF ARIZONA, Plaintiff, v. BILLY JOE FLANNIGAN, Defendant.	No. CR-95-90117 **PLEA AGREEMENT**

any term or terms state above in paragraph one, without limitation.

I have personally and voluntarily placed my initials in each of the above boxes and signed the signature line below to indicate I read and approved all of the previous paragraphs in this agreement, both individually and as a total binding agreement.

Date_____ Defendant_____
BILLY JOE FLANNIGAN

I have discussed this case with my client in detail and advised him of his constitutional rights and all possible defenses. I believe that the plea and disposition set forth herein are appropriate under the facts of this case. I concur in the entry of the plea as indicated above and on the terms and conditions set forth herein.

Date_____ Defense Counsel_____
Mark Nermyr

I have reviewed this matter and concur that the plea and disposition set forth herein are appropriate and are in the interests of justice.

Date_____ Prosecutor_____
Michael G. Gingold

APPENDIX C

SUPERIOR COURT OF ARIZONA
Maricopa County

CLERK OF THE COURT
R193B

July 20, 1999 HONORABLE MARK F. ACETO

D. Smalley
Deputy

No. CR 95-90117

FILED: 07-22-99

STATE OF ARIZONA

County Attorney
By: Michael Gingold

v.

Mark Nermyr, PD

BILLY JOE FLANNIGAN
DOB: 09-05-68

SENTENCE OF IMPRISONMENT

9:47 a.m. State is represented by above-named counsel. Defendant is present with above named counsel.

Court Reporter, Jodie Guhr, is present.

The Defendant is advised of the charge, the determination of guilt and is given the opportunity to speak.

SUPERIOR COURT OF ARIZONA
Maricopa County

CLERK OF THE COURT
R193B

July 20, 1999 HONORABLE MARK F. ACETO

D. Smalley
Deputy

No. CR 95-90117

STATE v. FLANNIGAN Continued

THE COURT FINDS that reasonable efforts have been made to give the victim notice of this proceeding and an opportunity to be heard.

Pursuant to A.R.S. Section 13-607,

THE COURT FINDS AS FOLLOWS:

WAIVER OF TRIAL. The Defendant knowingly, intelligently and voluntarily waived his right to a trial with or without a jury, his right to confront and cross examine witnesses, his right to testify or remain silent and his right to present evidence and call his own witnesses after having been advised of these rights. The determination of guilt was based upon a plea of guilty.

SUPERIOR COURT OF ARIZONA
Maricopa County

CLERK OF THE COURT
R193B

July 20, 1999 HONORABLE MARK F. ACETO

D. Smalley
Deputy

No. CR 95-90117

STATE v. FLANNIGAN Continued

Having found no legal cause to delay rendition or judgment and pronouncement of sentence, the Court enters the following judgment and sentence:

IT IS THE JUDGMENT of the Court that the Defendant is guilty of the following crime(s) as set forth on the following page(s), that upon due consideration of all the facts, law and circumstances relevant herein, the Court finds that suspension of sentence and a term of probation are not appropriate and that a sentence of imprisonment with the Department of Corrections is appropriate.

THE COURT FURTHER FINDS that there are circumstances sufficiently substantial to call for the term as indicated. These circumstances are state by the Court on the record

SUPERIOR COURT OF ARIZONA
Maricopa County

CLERK OF THE COURT
R193B

July 20, 1999 HONORABLE MARK F. ACETO

D. Smalley
Deputy

No. CR 95-90117

STATE v. FLANNIGAN Continued

AS PUNISHMENT, IT IS ORDERED that the Defendant is sentenced to a term of imprisonment and is committed to the Arizona Department of Corrections as follows:

OFFENSE: NEGLIGENT HOMICIDE
FELONY CLASS: 4 NONREPETITIVE
IN VIOLATION OF A.R.S. Section 13-1101, 13-1102, 28-444, 28-445, 28-448, 13-701, 13-702 and 13-801
DATE OF OFFENSE: 08-18-94
SENTENCE: 2 years
MITIGATED
NONDANGEROUS

This sentence is to date from July 20, 1999.

The Defendant is to be given credit for two years served prior to sentencing.

SUPERIOR COURT OF ARIZONA
Maricopa County

CLERK OF THE COURT
R193B

July 20, 1999 HONORABLE MARK F. ACETO

D. Smalley
Deputy

No. CR 95-90117

STATE v. FLANNIGAN Continued

IT IS FURTHER ORDERED that the Defendant shall serve one day for every seven days of the sentence imposed under the supervision of the Community Supervision Program, to be served consecutively to the actual period of imprisonment.

RESTITUTION: IT IS ORDERED the Defendant shall make and pay restitution to the victim(s) of this crime, for the economic loss of the victim(s), through the Clerk of the Superior Court in the total amount of $1,792.26. Restitution is owed in the following amounts of the following persons:

MCSO Business Office $1,792.26

Payment shall commence on the first day of the second month upon release from custody of the Department of Corrections. Said payment shall not be less than $40.00 per month.

SUPERIOR COURT OF ARIZONA
Maricopa County

CLERK OF THE COURT
R193B

July 20, 1999 HONORABLE MARK F. ACETO

D. Smalley
Deputy

No. CR 95-90117

STATE v. FLANNIGAN Continued

IT IS ORDERED the Adult Probation Office shall submit a new restitution ledger to the Clerk of the Court.

Pursuant to A.R.S. Section 12-116, Defendant shall pay a fee of $20.00 to the Clerk of the Superior Court of Maricopa County. Should Defendant pay all penalties, fines and/or sanctions in full this date, said fee is not applicable.

The Defendant is advised concerning rights of review after conviction and written notice of those rights is provided.

IT IS ORDERED granting the Motion to Dismiss Counts 2 and 3.

IT IS ORDERED the defendant shall not be transported to the Department of Corrections as he has served the sentenced imposed.

IT IS FURTHER ORDERED the defendant shall report to the Adult Probation Department upon release from jail.

SUPERIOR COURT OF ARIZONA
Maricopa County

CLERK OF THE COURT
R193B

July 20, 1999 HONORABLE MARK F. ACETO

D. Smalley
Deputy

No. CR 95-90117

STATE v. FLANNIGAN Continued

ISSUED: Order of Release

FILED: Notice of Rights of Review After Conviction.

Let the record reflect that the Defendant has waived the preparation of a presentence report.

cc: DOC – Certified Copy via Certification Desk
MCSO-AIS – Certified Copy via Certification Desk

SUPERIOR COURT OF ARIZONA
Maricopa County

CLERK OF THE COURT
R193B

July 20, 1999 HONORABLE MARK F. ACETO

D. Smalley
Deputy

No. CR 95-90117

STATE v. FLANNIGAN Continued

Later:

The Court has been informed that the defendant must be transported to the Arizona Department of Corrections and released from there.

IT IS THEREFORE ORDERED authorizing the Sheriff of Maricopa County to deliver the Defendant to the custody of the Arizona Department of Corrections and authorizing the Department of Corrections to carry out the term of imprisonment by releasing the defendant forthwith.

APPENDIX D

17 A.R.S., Arizona Rules of Criminal Procedure, Rule 31.23(b) states:

(b) Stay of Mandate Pending Application for Certiorari.

(1) *Automatic Stay in Capital Cases Affirming Death Sentence.* The clerk of the Supreme Court shall issue the mandate in capital cases when the time for filing a petition for writ of certiorari in the United States Supreme Court from the decision affirming the defendant's conviction and sentence on direct appeal has expired, or, in a case in which a petition for writ of certiorari has actually been filed, when the clerk of the Supreme Court is notified by the United States Supreme Court that the petition has been denied. The filing of a petition for rehearing of the denial of a petition for writ of certiorari shall not delay the issuance of the mandate.

(2) *In All Other Cases.*

(i) A stay of the issuance of the mandate of either the Court of Appeals or the Arizona Supreme Court pending application to the United States Supreme Court for a writ of certiorari may be granted upon request.

(ii) An application for a stay of the issuance of a mandate of the Arizona Supreme Court may be filed with the clerk of the Arizona Supreme Court within 15 days after the filing of the court's opinion, memorandum decision or order denying a motion for reconsideration.

(iii) An application for a stay of the issuance of a mandate of the Court of Appeals may be filed with the clerk of the Court of Appeals within 15 days after an order of the Supreme Court denying a petition for review, or in any other situation requiring the Court of Appeals to issue a mandate.

(iv) The stay shall not exceed 90 days unless the period is extended for cause shown. If, during the period of the stay, there is filed with the clerk of the appropriate court a notice that the party who has obtained the stay has filed a petition for a writ of certiorari, the stay shall continue until the clerk is notified by the United States Supreme Court that the writ has been denied or, in a case in which the writ has been granted, that a mandate has been issued by the United States Supreme Court.

17 A.R.S., Arizona Rules of Criminal Procedure, Rule 31.19(c) states:

(c) Form and Contents. The petition and cross-petition for review shall be bound or fastened and shall comply with Rule 31.12. An original and six copies of the petition or cross-petition and an original and two copies of any separately bound or fastened appendices shall be filed. The parties shall be designated as in the Court of Appeals. A copy of the Court of Appeals' decision shall be attached to the petition. Where the Court of Appeals' decision is simply an order declining to accept jurisdiction of a special action, a copy of the Superior Court's decision from which the petition for special action was taken shall also be attached to the petition. The petition shall not exceed 12 pages whether done in proportionately spaced or monospaced typeface, exclusive of the appendix and attached decisions, and shall contain concise statements of the following:

(1) The issues which were decided by the Court of Appeals and that the petition wishes to present to the Supreme Court for review. The petition shall also list, separately and without argument, those additional issues which were presented to, but not decided by, the Court of Appeals and which may need to be decided if review is granted.

(2) The facts material to a consideration of the issues presented to the Supreme Court for review without appropriate

references to the record on appeal. No evidentiary matter shall be included unless material to a proper consideration of the issues presented, in which instance a reference shall be made to the record or page of the transcript where such evidence appears.

(3) The reasons the petition should be granted, which may include, among others, the fact that no Arizona decision controls the point of law in question, that a decision of the Supreme Court should be overruled or qualified, that conflicting decisions have been rendered by the Court of Appeals, or that important issues of law have been incorrectly decided.

If there are documents in the record on appeal that are necessary for a determination of the issues raised by the petition or cross-petition, the petition and cross-petitioner shall file, simultaneously with a copy of the petition and cross-petition, an appendix consisting only of such documents. If the appendices exceed 15 pages in length such appendices shall be bound or fastened together separately from the petition and the copy of the Appeals Court's decision or the cross-petition.

Any petition for review presented for filing that does not substantially comply with this rule may, in the discretion of the clerk of the appellate court, be returned to the petitioner by the clerk with written instructions to the petitioner to file a proper petition within 30 days from the date on which the written instructions are mailed to the petitioner.